IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ChipBLASTER, INC., and GREGORY S. ANTOUN, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 04-250 ERIE
MIKE KENNEY TOOL, INC., d/b/a COOLJET SYSTEMS, Defendant	)	

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Courtroom C, U.S. Courthouse, Erie,

Pennsylvania, on Thursday, June 30, 2005.

APPEARANCES:

STANLEY D. FERENCE, III, Esquire, appearing on behalf of the Plaintiffs.

FREDERIC G. ANTOUN, Esquire, appearing on behalf of the Plaintiffs.

LELAND P. SCHERMER, Esquire, appearing on behalf of the Defendant.

CRAIG A. GELFOUND, Esquire, appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the proceedings began at 10:05 a.m., on Thursday, June 30, 2005, in Courtroom C.)

THE COURT: This is the time we've set for oral argument on the motion for partial summary judgment filed on behalf of the defendant. Who's going to be arguing on behalf of the defendant this morning?

MR. GELFOUND: I will, your Honor, Craig Gelfound.

THE COURT: Do you want to come on up to the podium. I've had an opportunity to read the briefs, I'm conversant with the case law, I'm also conversant with the record. Fire away.

MR. GELFOUND: Thank you, your Honor. I think this is a very straightforward and simple case, there's been a lot said in the briefs. A lot of evidence has been introduced. I think some of that tends to obscure some of the issues, I'd like to break through that obscurity today and concentrate on what the real issues are. And I think once we do so, summary judgment may be in order.

CoolJet technology, just to give some background. Very briefly, CoolJet produces a product, produces a coolant delivery system for machine tool operations. They have a pump, the pump delivers fluid from a reservoir to a tool. The pump is driven by a motor. The speed of the motor determines the

pressure at which the coolant is delivered to the tool.

THE COURT: Can I interrupt you for a minute.

MR. GELFOUND: Please.

THE COURT: Let me see if I can start to clear out some of the underbrush here, things that I may have thought were in dispute but genuinely are not. In preparation for our get-together today, I went back and reread our status conference where I had asked for an overview. My first question is this. The term computer is used in the claim. And if I remember correctly, in your papers there was some attempt to suggest that you don't really use a computer like a main point. Is it fair to say when I peel, try to peel the apple backward to get to the core, I see this case coming down to one primary dispute. And that is whether or not you, your machine adjusts the speed of the pump based upon both the pressure and the size of the orifice. And the corollary to that is whether or not your computer, I put quotes around computer, is programmed in advance with information relative to the size of the orifice. You say the critical difference between your machine and their machine, such that your machine does not literally infringe, is that you rely exclusively on the pressure, quite independent of the orifice size. Where the clear language of their claim requires their machine to consider both. Now, do you view that as one of the central issues of the case?

MR. GELFOUND: Yes, I do. I believe that is the central issue that we present in our summary judgment motion today.

THE COURT: All right. And before we talk a little bit, I'm sure you'll talk a lot about why there is no material issue of fact as to whether or not your patent infringes -- let me see if I can find my note on this. It's your view, I take it, and I'm on the claim construction end of things now, I'm not on the infringement end, we're just looking at the claim, you don't see anything ambiguous about the language to the claim, do you?

MR. GELFOUND: I do not.

THE COURT: All right. Do I take it, then, that seeing nothing ambiguous under Victronics and that line of cases, it would be your view that all I need to do is intrinsically look at the language of the claim, there's no reason to go outside the claim and the real battle ground, insofar as you are concerned, is whether or not your patent infringes?

MR. GELFOUND: I would say that, I would say that's true. I would qualify that to the extent there is an ambiguity or some ambiguity is believed to exist, then we should look at the specification to clarify that ambiguity.

THE COURT: Is there an ambiguity in your view?

MR. GELFOUND: In my view, no.

THE COURT: All right. Now, let me cut right to the chase. And the chase, as far as I'm concerned, is Mr. Adelman. Mr. Adelman -- let me see if I brought it out with me, filed an affidavit. Well, it's the declaration of William Adelman. I'm paraphrasing it now, it speaks for itself, and you spent a considerable amount of time addressing it in your papers, by way of attempting to disabuse me of a perceived notion that that might have created a material issue of fact. Mr. Adelman essentially says that -- the CoolJet system operates in such a way that in part it is programmed with the area of the orifice. He says that at several different paragraphs. In your papers you acknowledge the fact that in a summary judgment setting experts can weigh in with opinions, which under certain circumstances can be sufficient to create an issue of fact or perhaps resolve an issue of fact. But do I take it that your major objection with Mr. Adelman, insofar as his ability to create an issue of fact, is that you feel that his opinions are unsubstantiated?

MR. GELFOUND: That's right, your Honor. I feel that they're merely conclusory, they have no support. Their opposition -- it's said in a lot of different ways. But what they're saying, basically, is two propositions. One, that the CoolJet system can maintain a constant pressure only over a fixed or a finite range of flow areas or the tool. And, second, that that range must be programmed into the system.

Now, with respect to the first proposition, I think I would agree, I'll admit here in open court that the system can only handle a finite range of orifices. What happens in the system, as I was discussing previously and I'm sure you're aware of, is as the pressure of the orifice starts to grow, assuming everything in the system remains constant --

THE COURT: If the orifice grows, the pressure drops?

MR. GELFOUND: The pressure drops, the motor speeds up. At some point in time the motor is going get at its maximum operating speed. You can't make the motor go any faster. If the orifice size increases, the pressure drops further, the feedback loop can't correct that. The orifice -- it's a limitation on the motor, and no amount of programming will change that. No amount of programming can change the speed of the motor. If you need to support a larger orifice size, you need a higher performance motor. So you select your motor, you select your pump to meet ultimately what you expect to use on the machine. But there's absolutely no reason to program that information into the system.

THE COURT: When you say that information, do you mean orifice, the range of --

MR. GELFOUND: The range of the orifice size.

THE COURT: So I'm clear, I think I'm clear, the reason you say there is no information, that there is no reason

to do that is because you contend in your feedback system you get all the material information you need based upon pressure alone?

MR. GELFOUND: That is correct. And if I might add, just to go back to the claim construction. Even if, even if the range was programmed into the system, which we conclude it's not --

THE COURT: Do you mean the range of potential orifice sizes?

MR. GELFOUND: That's correct, the range of potential orifice size. It still wouldn't satisfy the limitations of the claim. Because remember the claim requires that the speed of the motor be determined by, one, coolant pressure and, two, the flow area of the orifice. Let me just give you an example. If the pressure was balanced with psi, and the tool orifice size was two millimeters, two square millimeters, and you programmed into the machine the range of orifice size that can be handled. For example, say one to four millimeters, in which the machine can maintain a constant pressure. From that one to four millimeters, you still would not have any information on the size of the orifice. You would still not know whether it's a one, two, three or four millimeter orifice size. Yet, you need that information in combination with pressure to compute the speed of the motor, that's a requirement of the claim.

THE COURT: All right. Go ahead. Tell me whatever else you want to tell me?

MR. GELFOUND: Well, let's go back to the claim interpretations, I think that's the central issue here. I think if a claim interpretation is construed properly, then we don't even have to consider ChipBLASTER'S brief. We just talked a moment ago about the specific claim language, how the speed of the motor is determined. But there's at least two -- well, there's actually three reasons why the claim interpretation I'm proposing is the right interpretation. One, it's consistent with the claim language. It's consistent with other terms in the claim, it's consistent with --

THE COURT: Not to interrupt you, why, if the language is clear, is it necessary to interpret anything, what are we interpreting -- what are the terms of art that are ambiguous, what are the technical terms -- what are the terms that may have acquired meaning?

MR. GELFOUND: I don't think the terms do require special meaning. Let me state what I think the issue is here. We contend, again, to compute, to determine the speed of the motor, you must use both the pressure and the flow area of the orifice.

THE COURT: Under their claim?

MR. GELFOUND: Under the claim. The other side urges a different interpretation. That all that is required is

that you determine the speed based on the pressure. According to the other side, I believe, since orifice size may affect pressure, that that information is not really required.

THE COURT: I'm speculating here and it's neither here nor there, but does it strike you as a possibility that perhaps that claim language was unartfully drafted?

MR. GELFOUND: I don't think that's true. Because, again, to the extent it's ambiguous, because it was not artfully drafted, then we can turn to the spec to see what those claims really mean. What the inventor had intended. And I think there are sufficient examples in the specification that show that the speed -- the computer receives both. The pressure and the flow, the flow area of the orifice size to ultimately compute the speed. Can I go over one?

THE COURT: Sure.

MR. GELFOUND: In my reply brief and I think in my moving papers, I referred to one section in the spec. And I'm sure you read it. So I'm not going to repeat that one. But flying here yesterday I came across, reading the spec again, another section that I thought was very interesting, and that's not in my brief, I thought it might be worth talking about it this morning. And it really answers the question why. Why would a feedback system want to know what the orifice size is, isn't it enough to just have pressure, can you change the speed of the pump based on pressure, using feedback to maintain it at

a constant pressure. What purpose does the orifice size serve. And there's an interesting passage in the specification, I think deals directly with that. I don't know if you have it in front of you, it's column two, lines 35 to 42. Let me just read it, it's rather short. "While the coolant supply system is self-correcting, that is the speed of the motor can be adjusted for pressure variations, by providing the computer with each tool's coolant pressure requirements," and by the way coolant pressure requirements are defined in the preceding sentence as the flow area orifice. So let me read that again. "By providing the computer with each tool's coolant pressure requirements, the computer can anticipate pressure fluctuations and react by adjusting the pump motor speed prior to the fluctuations occurring." Now, what that means is that if you have a two millimeter tool, and you swap out to a three millimeter tool, instead of waiting for the pressure to drop and the feedback loop to kick in to actually adjust the speed of the motor, to maintain the pressure, if you know in advance that you're going to change the tool from a two to a three millimeter tool, you can send that information to the computer, the computer then can compute the speed ahead of time based on the desired pressure and that three millimeter tool orifice size.

THE COURT: So, in other words, you're saying that that prevents the slight delay that you might have, is that

what you're saying?

MR. GELFOUND: That's right. It's quicker. That is simply one use of using data or information that actually tells the computer what the flow area size is. Which I think is undisputed that we don't have a signal that in fact contains that information.

THE COURT: I'm not sure that is undisputed, but we'll see. How do I, in trying to resolve this, of course, it would inappropriate for me to resolve it if I find an issue of material fact. You fundamentally and your experts fundamentally disagree with Mr. Adelman's conclusion that your system also requires the programming of orifice size as one of the conditions of maintaining a variable flow; you fundamentally disagree with Mr. Adelman's conclusion in that regard, don't you?

MR. GELFOUND: That is correct, your Honor.

THE COURT: I'm not trying to be overly simplistic here, but I don't like getting reversed at the circuit anymore than anybody else, why isn't that the beginning and end right there, why don't I have a material issue of fact on my plate, if for no other reason because of Mr. Adelman?

MR. GELFOUND: I think there's a number of reasons, in my opinion. I mean, let's start with the fact that it is expert opinion and it appears to be expert, there is no personal knowledge --

THE COURT: He's the chief engineer at ChipBLASTER, he's an expert.

MR. GELFOUND: He's an expert. It's an opinion. But he's provided no basis, no facts, no rationale, no reasoning, why this information needs to be programmed into the system. As I talked about earlier, there is going to be a range of orifice that can be supported by constant pressure. That is going to be based on the capability of the motor and the capability of the pump. No amount of programming can change that. So, it appears to me that they don't meet the requirement of 56(e). Let me raise two other points with respect to Mr. Adelman's testimony. Now, I want to refer back to the specification, I think this is a good opportunity to do so since this is not in our moving papers.

THE COURT: All right.

MR. GELFOUND: Again, I don't know if you have it in front of you, I'll read it, this is column four actually.

THE COURT: Where does it appear in the record?

MR. GELFOUND: It appears in the record as a request for judicial notice filed by plaintiffs in the patent.

THE COURT: I'm sorry?

MR. GELFOUND: It's in the patent -- which is submitted pursuant to a request for judicial notice. This is out of the spec. And, interestingly, it says "the inherit characteristics of the fluid control unit are programmed into

the computer. The only critical relationship that the computer needs to be programmed with," again, I'll repeat that, "the only critical relationship that the computer needs to be programmed with is the frequency required to drive the pump at a speed that results in the desired coolant pressure." It says nothing in here about the range of orifice size. Now, if you go to the declaration, what Mr. Adelman says is that the range of orifice size must, he uses the word must, be programmed into the system in order for the system to operate properly.

THE COURT: That's pretty much what he says.

MR. GELFOUND: And there is no mention about that in the spec, the spec goes out of its way to identify the only critical element that's required. So I think that the patent application is far more probative than the declaration. Let me raise one more point that I think is very critical. Let's assume, and we don't agree, but let's assume for sake of argument that the range is programmed in the computer. Let's assume the range that can be supported is one to four millimeters. And according to Mr. Adelman, if we go into the computer and we program one to four millimeters, now --

THE COURT: Those are the range of the drill tools which might be used?

MR. GELFOUND: That's right, in which the system can maintain a constant pressure.

THE COURT: All right.

MR. GELFOUND: Let's assume the pressure system is 1,000 psi. Let's assume that the tool orifices at the tool that actually is being used has an orifice of two millimeters. Now, the computer needs to determine the speed of the motor based on both the pressure and the orifice size. The flow area of the orifice size.

THE COURT: Hold your thought for one second, will you. I'm sorry, go ahead. Start that all over again, will you?

MR. GELFOUND: The scenario I'm laying out, we have a system that can support tools within an orifice range of one to four millimeters, which would be programmed into the computer. We have a thousand psi in our system. We have a tool with an orifice size that's actually being used of two millimeters. The computer receives a signal from the transducer saying it has a thousand psi. And it knows, because it's programmed with this information, that the range is one to four. But it still has no way to determine from that information program that says the orifice range is one to four, it has no way to determine what the actual orifice size is. It doesn't know whether it's one, two, three or four. It needs to have that information, it needs to compute the speed of the motor based on a thousand psi and two millimeters. And it can't obtain it from range of information. Even if the range of information is programmed into the computer, it doesn't

matter, the product is still not covered by the claim.

THE COURT: Let me ask you this question. I'm going to ask you to talk to me about their product and how you understand their product actually works. Now, I know what their claim says and I know what you say their claim says, which is the speed of the pump is a product of two components; a pressure reading and an orifice reading. Now, if you can't do it, and if it makes no sense for you to do it, your point being pressure is pressure, if you test the pressure that's all you need to know, because the pressure is nothing more than a byproduct of orifice size. If you can't do it, how can they do it -- does it make any more sense for them to do it than for you to try to do it?

MR. GELFOUND: Well, I just gave you an example in the specification of one benefit of using the dimension of the tool, and that was to increase the response time.

THE COURT: But you don't do that, do you?

MR. GELFOUND: We don't do that. We use the fundamental feedback loop that has been used for years. That has been used by Grundfos --

THE COURT: Do they do that?

MR. GELFOUND: I can't answer that, your Honor, because I don't know --

THE COURT: You don't think they know what they're doing. In your papers, it's not a pejorative, but I think you

indicate part of the problem is you are not convinced that the plaintiff understands its own product or your product?

MR. GELFOUND: I'm not sure that was the point I was trying to make, your Honor. I think that I took objection to the fact that they were trying to compare their product with our product, which I think is trying to taint us before the court and it's immaterial to patent infringement. If their design fits within the scope of their patent, fine. If they redesigned it for any other reason, fine. All this comparison stuff merely says that they decided, if in fact their machine operates like ours, they decided to not use the technology embodied in their patent, rather than go to a more commercially viable approach.

THE COURT: This is purely a hypothetical. If it were determined that as a matter of fact, engineering fact, I guess, that your product, in order to perform its desired function, required the programming of orifice size in a similar fashion to what the plaintiffs' product does, would you concede that there would be a potential problem with respect to literal infringement?

MR. GELFOUND: I'm not sure I fully appreciate your question, your Honor.

THE COURT: I can rephrase it, then I'll let you talk, I apologize for interrupting you.

MR. GELFOUND: No problem.

THE COURT: If your premise is that you are entitled to summary judgment because as a matter of fact your product is materially different in that it does not require the programming of orifice size, my question is, if it would come to pass that a fact finder were to conclude that it does require the programming of orifice size, would there be an infringement problem?

MR. GELFOUND: I can't -- answer that one-hundred percent, but I will concede this. That in the context of a summary judgment, as presented to you here today, with regard to the issues I raise, I would say if it is shown, yes. If it were shown that the computer must be programmed with the actual orifice size that's being used in the machine, which means that it's dynamic, it's changing, so if you switch from two to three, now we receive a signal from the tool or elsewhere --

THE COURT: Such that the computer or the mind of the machine is actually sensitive to the switch of orifices?

MR. GELFOUND: Yes. And I must also add that it must also, not just be programmed with that information, but it must then use that information in combination with the pressure to arrive at the speed of the motor.

THE COURT: Could it be that one of the reasons that you might want a system which produced a motor speed based on a combination of pressure and orifice readings, is that it prevents any delay in the system when an orifice is changed?

MR. GELFOUND: Well, yes, your Honor, I just read a passage of the specification that addressed that.

THE COURT: All right. Of course, in addition to literal infringement there is the doctrine of equivalents. And you spend sometime in your brief talking about the inapplicability of that doctrine based I think in large measure on your contentions relative to prior art, is that right?

MR. GELFOUND: That is correct, your Honor.

THE COURT: Tell me a little bit about that?

MR. GELFOUND: We contend and we've submitted declarations to evidence that our system is very much like the Grundfos system that existed prior to the Antoun patent. When I say very much like the Grundgos system, I mean very much in the context of the claim --

THE COURT: That was a closed-loop feedback system based on pressure?

MR. GELFOUND: That's right. They have a pump, the motor, the speed of the motor is controlled by the feedback loop.

THE COURT: That was 1995 or something?

MR. GELFOUND: That is correct.

THE COURT: So did you knock off their system?

MR. GELFOUND: No, we did not. But we looked at their system. By the way, they didn't patent their system, so it is in the public domain. Had they had a patent, we would

have never had knocked off anything, I assure you, your Honor.

THE COURT: I take you at your word. In any event, your point is it was out there in the public domain?

MR. GELFOUND: It was out there in the public domain exactly what we were doing. Now, ChipBLASTER contends that the pumps are different. And I might be getting this mixed up, either we or, I'm sorry, either the patent or the Grundfos system, I think it's the Grundfos system, required an impeller pump. Which is different than the pump that ChipBLASTER uses and discloses in its specification. But the claims are not limited to that type of pump.

THE COURT: What was the name of your initial product, I can't remember it?

MR. GELFOUND: The prototype?

THE COURT: The one you had to punch in and it didn't sell very well?

MR. GELFOUND: That was the AutoSep, your Honor.

THE COURT: And that was a product that actually the mind or the controller, if you will, of that was the operator, right?

MR. GELFOUND: I don't agree, that is a characterization that was made by ChipBLASTER. The dial on the front was used to set the pressure, as opposed to punching it in or programming it in. But once you set the pressure on the dial, whether it's 900, 1,000, 1,100 psi, the feedback loop

would still control. In other words, the transducer would monitor the pressure in the system and provide feedback to control the motor speed to maintain a constant pressure.

THE COURT: All right. Just by way of background, it is not germane, but it's more informational, you two folks aren't the only outfits who make these variable pressure machines, are you or are you?

MR. GELFOUND: To the best of my knowledge, no. I think there may be others, I can't say for certain.

THE COURT: All right, I see plaintiffs' counsel shaking his head, we'll hear from him presently. Is there anything else you want to tell me before I hear from them, then I'll let you reply when they're done?

MR. GELFOUND: Yes, I think we touched upon just about everything. I will say that I did submit, as you recall in my reply brief, this lengthy manual. A number of chapters out of the Toshiba instruction manual. And I apologize, your Honor, I thought long and hard before doing this. There is a lot of information, I hate to clutter your desk, but I thought it was important. Because all the programming that occurs is in the VFD, the variable frequency drive. And this manual talks about every single parameter and describes the function of every single parameter. So if you looked at this and read through this, you would find that not a single parameter has anything to do with the orifice size, the flow area of the

orifice. It deals with increasing or optimizing the response time of the motor. I think that this alone is proof positive that there is no programming of information with regard to the range of orifice sizes used in the system. But I would further say that even if the range is programmed, there's still no infringement because there's no way to determine what the actual orifice size of the tool is, which is required in combination with the pressure to determine the speed of the motor.

THE COURT: All right, thank you, Mr. Gelfound.

MR. GELFOUND: Thank you, your Honor.

THE COURT: Who is going to be arguing for the plaintiffs?

MR. FERENCE: Your Honor, Stanley Ference for the plaintiffs.

THE COURT: All right.

MR. FERENCE: Your Honor, this is a summary judgment motion for non-infringement brought by CoolJet. As such, they have the burden of proof here. Mr. Gelfound makes the argument in his papers that somehow ChipBLASTER has failed to prove infringement. That's not our burden. Our burden -- what Mr. Gelfound's burden is, is to show that there is no disputed issue of material fact. We submit that, we have submitted evidence that shows there is a disputed issue of material fact.

THE COURT: What do you believe to be the critical

disputed issue of material fact or facts in this case, then we'll work backward from there?

MR. FERENCE: Your Honor, as it's teed up in the papers and as you brought to Mr. Gelfound's attention, it's whether or not the CoolJet equipment is programmed with data related to the flow area of the orifice means. Mr. Gelfound is talking about the flow area itself. The claim language, however, requires data related to the flow area of the orifice means.

THE COURT: All right. Now, this will be helpful for me before we begin our discussion. Give me, by way of a quick refresher course, a brief description as to precisely how your machine works?

MR. FERENCE: What our machine does is it maintains a constant volume of coolant through a cutting tool, and a cutting tool as the flow area. It's a drill bit with a cylinder down the center, the coolant is pumped through.

THE COURT: It's not unusual, is it, that during the course of a working day that the drill bit or tool end will be changed many times?

MR. FERENCE: That's correct. This is all automated. The machine in the shop is typically a self-contained unit, it's run by a computer, and there's no human intervention.

THE COURT: All right.

MR. FERENCE: When the tool is changed, you want to maintain a constant volume. The volume is programmed at some point into the machine, and you go from there. When the tool bit is changed, there is a pressure change. There's a transducer that controls the speed of the motor. Now, the motor itself, the drive is programmed prior to operation. As pointed out, the dispute here is essentially how the machines operate. If we look at what is in the record for the evidence to this, the only evidence that CoolJet has submitted with respect to the operation of its machines is contained in the declaration of Mike Kenney. In particular, two paragraphs. Paragraph six says, "CoolJet's variable speed pumping system does not have a computer between the transducer and the variable frequency drive. Instead, the pressure signal from the transducer is fed directly to the variable frequency drive." Paragraph seven says, "CoolJet's variable speed pumping system does not program a computer with any data related to the flow area of the orifice. Nor does it use this information to determine the speed of the pump motor. In the CoolJet's variable speed pumping system, the speed of the pump motor is determined solely by the coolant pressure." That is the only evidence before the court that CoolJet has submitted on the operation of its equipment.

THE COURT: That's what he says. What does Mr. Adelman say on the point?

MR. FERENCE: Well, we submitted three declarations. Mr. Adelman talks about the operation of the CoolJet equipment, so does Mr. Antoun's declaration. Mr. Antoun talks about the operation based on some of the publicly available information. He talks about how the CoolJet equipment is programmed with data related to the flow area, the area of the orifice. Mr. Adelman talks about that. And Mr. Adelman goes a step further and uses information that is available on CoolJet's Web site to actually calculate the range of the flow area that the CoolJet equipment is programmed to operate at. Then we also submitted Mr. Hapeman's declaration. Mr. Hapeman is a technical expert that actually reviewed the CoolJet equipment. And goes into some detail as to how they go about programming it. So we have Mr. Antoun talking about how generally this type of equipment needs to be programmed with data relating to the area of the flow orifice. We have Mr. Adelman who actually goes through and calculates the range of the flow area that the CoolJet equipment is programmed to operate in. And then we have Mr. Hapeman who talks about exactly how CoolJet is programming their drive.

THE COURT: Let me ask you this. Would it be accurate to say on a given day with respect to a given machine, you would know in advance or the programmer would know in advance that -- the pressure will be running between 100 psi and 1,000 psi, depending upon the nature of the job, fair

enough -- there's a range within which it will vary during the course of a workday. Now --

MR. FERENCE: Correct. And in the deposition testimony of CoolJet, it was discovered that the CoolJet equipment will not operate until it is programmed. And then once it is programmed, it is tested to insure that it does operate over the intended range.

THE COURT: Now, I might be oversimplifying this, but I gather that what CoolJet is saying is this. That they have a system which is sensitive to picking up and is programmed to pick up variations in pressure. And when the system picks up a variation in pressure, then it either speeds up or it slows down the pump?

MR. FERENCE: Yes.

THE COURT: And I might be oversimplifying this, but their point is why for heaven sakes do we have to worry about the size of the orifice if the amount of pressure that is ultimately being produced at any given point in time is simply a function of the size of the orifice. So if we're skinning the cat on the pressure end, why do we have to skin the cat twice and also crank in what the orifice is; do you follow my point?

MR. FERENCE: Well, there's several reasons, your Honor. One of which is the equipment is expensive and you want to maintain the life of the equipment. You don't want to burn

the motor up.

THE COURT: All right.

MR. FERENCE: So there has to be some programming, because if the orifice size just increases and increases and increases in order to try and maintain that pressure, the motor is going to go, go and go until it burns out. So there has to be some programming as to the low and high operating speeds of the motor, which is based on the orifice, most other things is based on the orifice size. And the pressure itself is also based on the orifice size. The only thing that changed in the operation of one of these machines is the size of the orifice.

THE COURT: So the pressure can't be based on anything other than the orifice size, can it?

MR. FERENCE: That's correct?

THE COURT: Okay. So, if you have a system that is sensitive to changes in pressure, you really have a system which is at least indirectly sensitive to changes in orifice size, right?

MR. FERENCE: Correct. I mean, there are some statements in the reply brief from CoolJet along those lines, that seem to -- our questionable. One of which appears on page five. "Even if the orifice diameter range was programmed into the variable frequency drive, the accused products would still not infringe because that data provides no information whatsoever about the flow area of the tool orifice." Area is a

mathematical formula based on the radius, which is one-half of the diameter.

THE COURT: Here's the heart of it. Does your system, in order for it to function the way it's designed, is it necessary that in advance of a run, if you will, you program information via your computer as to -- actually, I should say you program your computer with information related to the area of flow of the orifice like your claim says?

MR. FERENCE: Both systems do, your Honor.

THE COURT: All right. But yours -- I want to get this clear. The type of information that you would input into your computer, related to the area, related with data related to the flow area of the orifice, what type of information would that be, tell me again -- what does the computer want to know and what do you want to put in it relative to the flow area of the orifice?

MR. FERENCE: What you're doing is you're programming the computer, the computer's control algorithm, and this is all set forth in Mr. Hapeman's declaration. It's a proportional-integral-derivative controller. And various parameters for the drive are programmed in. As we set forth in our papers, CoolJet modifies the factory default parameters. When they were asked what those parameters represented or how the parameters that they programmed in were obtained, they didn't know. Okay, Mr. Whitaker didn't know what those

parameters represented, he didn't know how they were obtained. Mr. Kenney also didn't know. The people at CoolJet don't know or were not able to tell us what those parameters represented or how those parameters were derived.

THE COURT: When your system is programmed with data relative to the flow area of the orifices, does that mean that it has (a), a memory, if you will, of the range of potential orifices that may be used on a given day?

MR. FERENCE: Yes.

THE COURT: Number one. But, number two, and critically, does it not only have a memory as to the range of potential orifices, but does it have a memory such that it can instantaneously react and perceive when a new orifice is put on and then make an adjustment?

MR. FERENCE: If I understand the question correctly, what happens is when the new orifice is put on, there's an adjustment made to the speed of the motor such that the pressure is maintained.

THE COURT: All right.

MR. FERENCE: The goal here is to maintain a constant volume.

THE COURT: All right. But there also is a component of your system that is constantly monitoring the pressure itself, is that right?

MR. FERENCE: Yes. As there is in both systems.

THE COURT: So, would this be fair to say, maybe I said it before, if I have, forgive the repetition. The reason you designed a system that is both orifice sensitive and pressure sensitive is that with respect to the orifice sensitive aspect of it, it permits an instantaneous reaction to a change in orifice size, such that you never lose any pressure, is that right, essentially?

MR. FERENCE: I think your question is based on --

THE COURT: My question is just my question, do you agree with it? If you don't I'll have it read back, I don't think I could ask it again, I asked it the way I wanted to.

MR. FERENCE: Why don't we have the court reporter read it back.

THE COURT: All right.

(Court Reporter reads back Court's question.)

MR. FERENCE: Your Honor, it's the transducer, the pressure sensor that automatically kicks in and makes sure that a constant volume is maintained.

THE COURT: All right.

MR. FERENCE: Now, as I started to say, Mr. Gelfound was reading from the spec and, quite frankly, in my view what he's trying to do is import limitations from the spec into the claims. The spec talks about the preferred embodiments at the time the application was filed. They're not to be used to limit the scope of the claims. The claims talk -- state what

the claims state about, and the limitations of the claims are met by both systems. Both by the ChipBLASTER system and also by the CoolJet system. Now, at the end of Mr. Gelfound's argument you were asking about are there other people out there manufacturing these systems. The answer to that is no. ChipBLASTER, whenever ChipBLASTER is aware of somebody else manufacturing its system, they write to them, bring the patent to their attention, and everybody but CoolJet has stopped manufacturing the system. So at this point in time CoolJet and ChipBLASTER are the only two parties that we're aware of manufacturing this patented system.

THE COURT: All right. Now, I think I understand how you program your computer with information relative to the orifices based upon our discussion. Now, it's your contention, notwithstanding the defendant's position to the contrary, that as a matter of fact, as a matter of engineering fact, if you will, the defendant does the same thing, correct?

MR. FERENCE: Correct.

THE COURT: It is your contention that in all material respects the programming that you do, insofar as it relates to orifice size, per your claim language, is precisely the same programming that they do relative to orifice size?

MR. FERENCE: Yes.

THE COURT: Okay.

MR. FERENCE: The equipment is the same footprint.

At one point the equipment was the same color scheme. It operates in substantially the same way, as set forth in Mr. Adelman's declaration. The components are virtually identical.

THE COURT: Could you have a system, could you have a system, a variable flow system, which would work perfectly well which was only sensitive -- whose computer never knew a thing about the potential range of orifices that might be used during a given workday and all that the feedback system was designed to be was sensitive at any given time to whatever the pressure in the line happened to be; could you have a system that could appropriately adjust the flow that was completely ignorant, from a computer brain standpoint, as to what the actual orifice size was at any given time?

MR. FERENCE: It's my understanding that you could not. As was said in the depositions, the CoolJet equipment will not operate without programming. And it's my understanding that there has to be programming data related to orifice size in order for this equipment to operate.

THE COURT: Are you splitting a fine hair when you say the data program related to orifice size, are you using that in the same sense as data programmed relative to range of pressure to the extent that pressure is a function of orifice size -- or are you talking about actual orifice size, actually you program orifice size, don't you?

MR. FERENCE: In the commercial embodiment we

program data related to orifice size just as CoolJet does. As I said, the patent was filed in '97, and the spec reflects at that point in time what was the preferred embodiment. Both machines operate the same way. And both machines use a variable frequency drive. Which in order to operate, has to be programmed with data related to the orifice size in order to operate. Once the initial programming is completed and then the system operates, you have a transducer which provides a feedback control that gives -- also provides information related to the orifice size.

THE COURT: Knowing as much as you do about their product, perhaps, in part by virtue of this litigation, are there any improvements -- let me put it this way. Does your product partake of any qualities that in your view make it more efficient than theirs or, otherwise stated, is their product lacking in any qualities that make it more deficient than yours?

MR. FERENCE: Their product is a functional duplicate of our product. One of the things that came out at the deposition -- when you talk about the AutoSep device, that's what CoolJet was showing in 1998 at the ITMS show. It came back and a development effort on the current product was led by the sales manager, who was at the ITMS show. Essentially, the sales manager said I need one of these pieces of equipment.

THE COURT: If, as a matter of fact -- as a matter of fact, this is the flip side of the same question I asked Mr. Gelfound, if as a matter of fact the CoolJet system functions completely independent of having programmed any information relative to orifice size, it becomes problematic for your position, doesn't it?

MR. FERENCE: It does. However, we believe that the CoolJet equipment does not operate in that manner.

THE COURT: In answering the question that way, you would you agree with me, as I think Mr. Gelfound does, that that issue, in the universe of potential material issues, is perhaps the most material?

MR. FERENCE: Yes, your Honor. And I come back to the evidence that is before the court, you need to make that determination based on an understanding of the operation of the CoolJet equipment. The only evidence that CoolJet has submitted on the operation of its equipment are the two paragraphs in the declaration of Mike Kenney. We've submitted declarations of Greg Antoun, saying that the CoolJet equipment is programmed, that all the equipment to operate in this manner has been programmed. We submitted the declaration of Bill Adelman saying the same thing and going further, calculating the range of orifice sizes for which the CoolJet equipment is programmed to operate. And we submitted the declaration of Bryan Hapeman, who reviewed the CoolJet equipment and comes to

the same conclusion. If we look at the Hapeman declaration, the Hapeman declaration says, in paragraph eight, "both systems regulate coolant volume with changes in the flow area of the orifices with the control systems' desire to maintain a particular pressure. The systems are also physically restricted from too high a pressure and by a mechanical relief value and from delivering too high a coolant volume by drive programming that restricts pump speed for those large area orifices that do not offer enough of a pressure restriction." And Mr. Hapeman's declaration --

THE COURT: As I read that, that doesn't say anything about programming -- he's not, whatever Mr. Adelman may say, unless I'm reading it wrong, that's just another way of saying that pressure is a function of orifice size. Does he say anything in that paragraph which supports the proposition that as a preliminary matter the defendant programs information relative to orifice size?

MR. FERENCE: The last sentence of paragraph eight talks about restricting the pressure based on drive programming. And what he's talking about there is setting an upper limit on the pressure by programming the drive.

THE COURT: I think the defendant would concede that they do that -- I think they would concede that they program a range of pressures -- is that right, you concede that?

MR. GELFOUND: We concede that we program the

variable frequency drive to increase the response time of the motor for optimized motor performance.

THE COURT: I'm not sure that's in dispute. I think what's in dispute is whether or not they program orifice size. See, what both bothers me, I have no fixed opinion on this, but this is why this argument is helpful. I want to make sure that you aren't trying -- you know the phrase too cute by half. You're not saying, it's not your position that they program orifice size simply because they program to be sensitive to pressure, and pressure is a function of orifice size, that's not your point, is it, because if it is, I need to know it?

MR. FERENCE: They don't do that when they initially program the drive. The drive is programmed initially to get the drive to function. And then during the operation of the drive, it is also programmed through the feedback loop.

THE COURT: Those are two different things. But to be clear, it's your position, although, you'd have to agree with that, that pressure is a function of orifice size?

MR. FERENCE: Very much so.

THE COURT: If that's all they did, we wouldn't be here, is that right -- do you understand my point; in other words, they concede that their feedback system is pressure sensitive. But they say their feedback system is, that's the reason their product works and the reason that it is capable of maintaining a variable flow is based on pressure sensitivity

only. Now, clearly, pressure is a derivative of orifice size?

MR. FERENCE: I don't think they agreed that pressure is a derivative of orifice size, though.

THE COURT: Do you disagree with that?

MR. GELFOUND: I would agree that -- I would agree that pressure is a function of orifice size. But I would like to add that pressure can change based on a number of other things.

THE COURT: Well, I know it can.

MR. GELFOUND: Then yes.

THE COURT: I mean as a matter of physics, primarily that is what changes the pressure, the orifice size. You can have a leak in the pipe, you can have something else, but the primary moving force for variable pressure --

MR. GELFOUND: I would also say that you need to consider the tool length, and length of the tool chain, that could have an impact. The tool holder, the plumbing, the viscosity. I would absolutely agree that the orifice size does influence pressure, of course.

THE COURT: All right. I'll take that as a yes for purposes of our discussion, that he generally agrees with what I was just saying. But, to be clear, your point goes one step farther. And you're saying that not only do they have a feedback system that is programmed to be sensitive to pressure changes, which are a derivative, if you will, of orifice sizes,

but you're saying that as an initial matter, their computer is programmed within the meaning of your claim, is programmed with information concerning orifice size, is that right?

MR. FERENCE: Yes.

THE COURT: They say it's not, is that right?

MR. FERENCE: Correct.

THE COURT: What about your equivalents argument?

MR. FERENCE: The range of equivalents is not restricted in this case. If you look at the file history that was attached to the declaration, the claims went through without any amendment. So there's no prosecution history -- to restrict the range of equivalents. And if for some reason there is not a literal infringement, Mr. Hapeman in his declaration said that this device operates in substantially the same ways, performs in substantially the same function.

THE COURT: I guess this only becomes relevant -- if it would come to pass that there was a determination that the defendant did not literally infringe, which in my view in this case would essentially mean that the defendant was right, that its program is based exclusively on pressure and quite independent of any programming based on orifice size. Your position would nevertheless be that notwithstanding that difference, the product is still substantially the same and operates in substantially the same way, right?

MR. FERENCE: Correct.

THE COURT: But his position is that your problem is that back in 1995, or at least as early as 1995, a variable pressure system, based upon a feedback system that was sensitive to pressure, was already out in the marketplace; how do you get around this prior art problem?

MR. FERENCE: Well, I think Mr. Gelfound is really making a collateral attack on the validity of the patent, which he has to in order to find the patent invalid, he has a very high burden of clear and convincing evidence. The patent is presumed valid. As set forth in our papers and in particular in the declaration of Greg Antoun, the Grundfos pump that is out there, that was out there the day they reference, it's an impeller type pump. Even in the declaration of Mike Kenney, it said it's not capable of maintaining the pressure that the present invention does. Typically, these machines operate at about a thousand psi or higher. With the impeller pump, you're lucky if you're going to get 200 psi. It's a totally different type of pump. The patent office -- in using the pump, that Grundfos pump in the present system, it would not work. And that is set forth in the declarations. Indeed, in the file history, in the notice of allowance, there are some comments directed to the reasons for this statement of allowance. And in the brief it says "none of the cited patents used separately or together teach for the design of programmable variable volume pressure coolant supply system comprises at least one

fluid pressure transducer, an electric AC pump motor, a variable frequency drive, electrically connected to said pump motor and a computer monitoring the coolant pressure via at least one coolant pressure transducer." So we don't feel that this Grundfos piece of art presents a problem with respect to the doctrine of equivalents.

THE COURT: All right, anything else you want to tell me?

MR. FERENCE: If I may have a moment to review my notes, your Honor?

THE COURT: Sure. While you're reviewing, let me ask you. Do I gather that -- do you find anything ambiguous about the face of your claim? Is there any ambiguity such that it would be necessary for me to on -- I didn't see it teed up this way in the papers, an extrinsic evidence hunt, to clarify ambiguous terms or to determine what a special meaning might be to a term? I kind of read this as kind of -- the language of your claim appears to me to be clear and unambiguous, am I wrong on that or did you do a bad job drafting it?

MR. FERENCE: I think the claim speaks for itself. It talks about data related to the flow area of the orifice means. I think the claim is reasonably clear.

THE COURT: So, do I take it, then, would you -- is it your opinion that the real battle ground here is not in the first instance on claim construction, but on the second issue

of whether there's actual infringement?

MR. FERENCE: Yes, as it was teed up in the papers, even adopting the claim construction propounded by Mr. Gelfound, there is infringement as a factual matter.

THE COURT: I'm going to take about a five-minute break, then I'll come back and see if you have anything else you want to say. Then on the basis of that further enlightenment, I'm going to make a determination as to whether I'm going to give you a ruling from the bench today or whether you are going to subsequently get an opinion down the road.

(Recess from 11:15 a.m.; until 11:22 a.m.)

THE COURT: Yes, sir.

MR. FERENCE: Your Honor, may I clarify something?

THE COURT: You sure can.

MR. FERENCE: I want to make it clear to the court that the initial program is based on the orifice size, not on the pressure. What you're doing is programming --

THE COURT: When you say what you're doing, I take it what you're telling me is what you are doing and what they are doing?

MR. FERENCE: Correct. You're telling it -- what happens is when you get a small orifice size, the motor speed is going to slow down, it's going to try and maintain the pressure. It's similar to a situation where somebody is driving down the street in a manual transmission car in third

gear and they're going slower and slower and slower. The car starts bucking. Eventually, you'll destroy the engine. The CoolJet and ChipBLASTER systems, what you're doing is programming the orifice size at which you're telling the motor to just give up. Shut yourself down so that you're not going to destroy yourself. Similarly, you're doing that with the high end. When you get a large orifice size, the motor is going to speed up to try to maintain pressure and it reaches the point where it's incapable of maintaining that pressure and the motor will burn up. So you are programming, initially, into the machines a high range, the higher orifice size and small orifice size at which the machine will work. And CoolJet puts out on a chart showing what the ranges are. So those ranges of the orifice size and flow area of the orifice are independent of pressure. You're not programming pressure in at that point. And we keep talking about the pressure, the pressure is really an indicia of the orifice size. When you place your hand over a flame, you're not actually, you may not actually be touching the flame. But you're feeling the heat that is generated by the flame. So when you measure temperature or feel the heat, you're getting an indicia of the flame, just like in these systems when you are measuring, you're sensing pressure, you're getting an indicia of the orifice size.

THE COURT: All right. I appreciate the

clarification. Mr. Gelfound.

MR. GELFOUND: Your Honor, I will be brief with my reply and, of course, if your Honor has any questions. I was listening to Mr. Ference speak and he mentioned on several occasions that I thought was a little humorous, how the only evidence that we have is the declaration of Mike Kenney with two paragraphs. But, yet, they've got declarations from all sorts of experts. Because they have such quantity that that has to raise an issue of fact. It's not the quantity but the quality. And Mr. Kenney has submitted evidence that the motor speed is determined by pressure alone and not by the flow area of the orifice. The declaration, I want to touch on for a moment, I believe that does not raise an issue of fact. I believe that they don't substantiate that the CoolJet system is in fact programmed with data related to range of the orifice size, but --

THE COURT: In fairness and to be accurate, they don't have to substantiate it, they simply have to raise a triable issue of fact.

MR. GELFOUND: I agree with you, your Honor, I misspoke. But, I think the most important thing, the thing I would like you to consider is even if everything they say is true, which we believe is not, but let's make that assumption, there is still no issue of fact. If you read those declarations, they say that they program a range of orifice

size that can be supported by the system. Again, I'm going to use my example. Say one to four millimeters. But from that you can't tell what orifice size is actually being used. And let me just touch on the language, I just want to read the actual limitation. "The computer determines the speed of said pump based on coolant pressure and the flow area of the orifice." Not the range -- but the flow area of the orifice. If you program one to four millimeters because that is the range and that tool changes during an operation from one, two, three and four, the computer doesn't know that. But the claim requires that to use that information to compute the speed of the pump, I'm sorry, to compute the speed of the motor. For that reason alone, even assuming that everything the experts say are true, there is no issue of fact, that claim limitation is not met based on the record before the court. Let me just talk just briefly about doctrine of equivalents. It is not an attack on the validity. It's a fundamental principle that you cannot expand the scope of your claim under the doctrine of equilvalents -- covered that which was in the prior art. Grundfos wasn't a prior art. Mr. Ference makes the argument that the impeller pump is different, it can't work in high pressure systems, so what.

THE COURT: The doctrine of equivalents is an equitable doctrine, correct?

MR. GELFOUND: That is correct.

THE COURT: Which is essentially designed to ensnare the unscrupulous who are smart enough to avoid literal infringement but essentially have still knocked the thing off?

MR. GELFOUND: That's correct. In applying the doctrine of equivalents, you cannot apply things so broadly as to read it as prior art, to ensnare that which was in the public domain. And the Grundfos system was. Their attempt to distinguish the two pumps, the impeller pump, which is a pump that CoolJet uses, that is irrelevant as a matter of law. The claims only recite a pump. The fact that the impeller pump may or may not work in a high pressure system, again, the claims do not require that it be a high pressure system. Clearly, the claim is limited under the doctrine of equivalents, such that it cannot encompass the CoolJet system. Thank you very much, your Honor.

THE COURT: Thank you. Let's go off the record for a second.

(Discussion held off the record.)

THE COURT: All right, I'm going to give you an order.

ORDER

Presenting pending before the court is a motion for partial summary judgment filed on behalf of the defendant. Wherein, the defendant seeks a ruling that its high pressure coolant delivery system does not literally infringe on the

Antoun patent, which I'll refer to hereinafter as the plaintiffs' patent. And, further, that the defendant is not liable under the doctrine of equivalents.

Summary judgment, of course, is appropriate only if the pleadings, depositions, answers to interrogatories, admissions on file, together with any affidavits which may have been filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. See Federal Rule of Civil Procedure 56(c).

Now, a literal infringement analysis essentially requires two steps. The first being that the asserted claims must be interpreted by the court as a matter of law to determine their meaning and scope. See Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed.Cir. 1995). At the second step, it is incumbent on the trier of fact to determine whether the claims as they have been construed, read or infringe on the accused product. In order to establish literal infringement, every limitation that is set forth in a claim must be found in an accused product, exactly. See Becton Dickinson and Company v. C.R. Bard, Inc., 922 F.2d 792 (Fed.Cir. 1990), as a general proposition infringement, whether under a literal analysis or under the doctrine of equivalents, is an issue of fact. Southwall Technologies, Inc. v. Cardinal IG Company, 54 F.3d 1570 (Fed.Cir. 1995).

The court in Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, (Fed. Cir. 1996), had an occasion to sketch out in some detail the appropriate analysis in construing a claim. The court observed:

First, we look to the words of the claims themselves both asserted and non-asserted to define the scope of the patented invention. Although, words in a claim are generally given their ordinary and customary meaning, patentee may choose to be his or her own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition of the term is clearly stated in the patent specification or file history. Id. The court in Vitronics then continued:

That it secondly is always necessary to review the specifications to determine whether the inventor has used any terms in a manner inconsistent with their ordinary meaning. And, third, the court may also consider the prosecution history of the patent.

Finally, the court had the occasion to address the significance of an ambiguously stated claim in the manner or method in which the court should approach a claim under those circumstances. The Vitronics court observed:

In most situations, an analysis of the extrinsic evidence alone will resolve any ambiguity in a disputed patent claim term; in such circumstances, it is improper to rely on

extrinsic evidence. In construing the claims, we look to the language of the claims, the specification and the prosecution history. Extrinsic evidence may also be considered if needed to assist in determining the meaning or scope of technical terms in the claims.

In large measure, then, it seems to me that the scope of the inquiry insofar as the claim analysis is concerned is dictated in large measure by the clarity or lack thereof of the claim terms. Here, independent claims 1, 7 and 14 each recite a programmable, variable volume and pressure coolant system with a motor-driven pump that provides coolant. The speed of the pump is controlled by a variable frequency drive. The requirements insofar as the computer is concerned that comprise the plaintiffs' claim are set forth as follows:

Said computer monitoring the coolant pressure via said at least one fluid pressure transducer, and being programmed with data related to the flow area of the orifice means; and wherein said computer determines a desired speed of said pump motor based on the coolant pressure and the flow area of the orifice means of the tool ...

Said computer controlling the variable frequency drive ... at a frequency that results in said pump motor running at a desired speed.

The defendant contends that, in its words, that the claim language is "clear and unambiguous." Specifically, as

set forth more fully at page nine of the brief, it summarizes the claim language as follows:

"It, meaning the claim language, "requires a programmed with data relating to the flow area of the orifice. The computer monitors the coolant pressure, and determines the speed of the pump based on both (1) the coolant pressure and (2) the flow area of the orifice. The computer controls the variable frequency drive to force the pump motor to run at the desired speed." That's page nine of the defendant's brief in support of its motion for summary judgment.

Consistent with the previously-described standards, I see nothing ambiguous in the claims as stated, nor the need for consideration of any extrinsic evidence to construe them. Further, I do not see that any special terms or meaning has been attached to any of the words in the claim, nor do I consider the prosecution history here is relevant in any form or fashion.

Having tried to peel this apple to its core, it seems to me that the critical issue in this case is whether or not as a matter of fact the defendant's product controls the speed of the pump based on both, emphasis on both, pressure and the flow area of the orifice. Or as otherwise stated, whether or not as a matter of fact in order for the defendant's system to function as it is designed, it is necessary that its computer be programmed with data related to the flow area of

the orifice. The defendant, through its experts, contends that its system, in adjusting the rate of flow, relies exclusively on the pressure and that unlike the plaintiffs' system, it does not program data into its computer relative to the flow area of the orifice.

As discussed more fully at oral argument and as previously reviewed by the court in preparation for the summary judgment argument, the plaintiff has produced several affidavits, and I should say parenthetically, the defendant has as well for the opposite proposition. But the plaintiff has produced affidavits in support of the proposition that contrary to the defendant's contention, it does in fact program information relative to the orifice size or flow. In part, Mr. Adelman's declaration, Mr. Adelman being an engineering manager with ChipBLASTER, opines, for instance:

"The range of orifice sizes in which pressure is maintained must be chosen by CoolJet, or any coolant delivery system manufacturer, based on pump motor's high speed cutoff related to the largest orifice flow area in the range, and low speed cutoff related to the smallest orifice flow area in the range."

Paragraph 10. "That data relating to the flow area of the orifice must be programmed into the computer that controls the variable speed drive in order for the coolant delivery unit to function properly, and as desired by its

manufacturer."

Paragraph 14. "After the initial programming related to the flow area of the orifice, as the flow area of the orifice changes with the change of the tool being used to cut or drill metal, the CoolJet system receives a signal from the transducer that is directly related to the flow area of the orifice, and varies the drive frequency, to cause the motor to spin faster or slower, and the pump to increase or decrease output, as described in the 216 patent."

In my view, then, as I said before, the critical issue insofar as the question of literal infringement is concerned is the issue as to whether the defendant in fact programs information relative to the orifice.

For the reasons previously set forth on the record, it is my view, consistent with the summary judgment standard I have previously indicated, that summary judgment is inappropriate because there remains, based in part on the declarations I previously described, a material issue of fact on that point such that its resolution by a fact finder, rather than by the court, would be appropriate. Let's go off the record.

(Discussion held off the record.)

(Whereupon, at 11:50 a.m., the proceedings were concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Ronald J. Bench